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No. 73-1084

Supreme Court, U. S.
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In the Supreme Court of the United States

OCTOBER TERM, 1973

WENDELL P. RYNERSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner seeks review of the decision of the Court of Claims dismissing his suit for retirement pay as barred by the applicable statute of limitations.

1. Petitioner served as an enlisted man and Reserve officer in the United States Army from November 22, 1927 to October 14, 1945, when he was relieved from active duty and discharged from his Reserve status as the result of a reclassification proceeding (Pet. App. 10-11). Pursuant to 10 U.S.C. 1331, petitioner was credited with 17 years, 10 months and 23 days of satisfactory service for entitlement to retired pay at age 60 (Pet. App. 8).

After two unsuccessful applications in 1957-1960 to the Army Board for Correction of Military Records for review of his discharge, and following denial of his claim on May 20, 1965 for retired pay benefits to begin

retroactive to May 1, 1965,[1] petitioner filed this suit in the Court of Claims on February 25, 1971, claiming that the termination of his commission and the denial of his application for retroactive retirement pay were "arbitrary [and] capricious" (Pet. App. 8, 11-12). The Court of Claims, relying on its recent decision in *Kirby* v. *United States*, 201 Ct. Cl. 527, petition for a writ of certiorari pending, No. 73-1257 (Pet. App. 15-34), dismissed the petition as barred by the statute of limitations (Pet. App. 34-35).[2]

2. The decision of the Court of Claims is correct and further review is not warranted. *Kirby* v. *United States*, *supra*, is correctly decided and is dispositive of petitioner's claims. See also *Hames* v. *United States*, 164 Ct. Cl. 746, certiorari denied, 377 U.S. 904; *Palmer* v. *United States*, 121 F. Supp. 643 (Ct. Cl.).

In *Kirby*, *supra*, a former Air Force sergeant brought suit in 1971 for active duty pay and allowances and retirement pay and allowances denied him as a result of an allegedly illegal 1963 discharge. In addition to holding the active duty pay claim barred by the six-year statute of limitations in 28 U.S.C. 2501 covering "[e]very claim of which the Court of Claims has jurisdiction" (Pet. App. 16-18), the court squarely held that when entitlement to retirement benefits depends upon invalidating an allegedly illegal discharge, an action for retirement pay brought more than six years subsequent to the discharge is also time-barred (Pet. App. 20-21):

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[1]Petitioner attained the age of 60 on April 28, 1965 (Pet. App. 11).

[2]Prior to the *Kirby* decision, the Court of Claims on November 11, 1971, initially denied the government's motion to dismiss based upon the statute of limitations (Pet. App. 9-10).

> [O]nce this plaintiff was officially discharged from the Air Force, he lost the right to earn future active duty pay, and, since he had not, at that moment, completed 20 years of service, the future right to receive retirement pay and allowances lapsed as well. The plaintiff had 6 years in which to challenge in court the legality of his discharge in order to protect his right to * * * obtain the needed years of service for retirement. This he did not do and cannot be allowed to do at this time through the vehicle of the retirement claim. The one rests on the other like a house on a foundation; without the foundation, the house will not stand.

In so holding, the court specifically rejected the basic contention raised by petitioner in this Court, *i.e.*, that his cause of action only accrued when he reached retirement age, stating (Pet. App. 26):

> The short answer to this idea supporting the proposition that a man should be permitted to sue at his convenience, for retirement on the basis of time not served, is that if the serviceman is discharged without having served 20 years, and he is unwilling to protect his right to continue to serve within the reasonable length of time provided by law, then he has no basis for seeking benefits that are supposed to accrue only to those who serve honorably for 20 years. Any other rule than here announced will lead to the filing of stale claims 25 years old, or older, and emasculate the statute of limitations. This is contrary both to law and public policy.

3. Petitioner's claim for retirement pay rests on two grounds: first, petitioner contends that his 1945 discharge operated only to remove him from active duty

and did not remove him from reserve status (Pet. 5-6). This contention was rejected by the Court of Claims (Pet. App. 9) and other than reiterate his original contention petitioner has made no attempt to support his position. The decision of the Court of Claims must therefore be accepted as correct.

Petitioner's second ground is that his 1945 discharge was arbitrary and capricious. As noted above, the Court of Claims correctly held that any claim based on the 1945 discharge was barred by the statute of limitations. This is not a case where a party discovers upon reaching retirement age that his entitlement to benefits turns on a challenge to his discharge. Petitioner was aware at least as early as 1957 that his discharge operated to deprive him of retirement benefits and petitioner made two unsuccessful attempts to have his discharge set aside (Pet. App. 11).

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

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